

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E518 OF 2023

ELIM PETER EPAGAN1ST
PETITIONER

ESTHER LOKAI ELIM.....2ND
PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST

RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION.....2ND

RESPONDENT

AMAILO INVESTMENT COMPANY

LIMITED.....INTERESTED PARTY

JUDGMENT

Petitioners' case

1. The petitioners filed this petition against the respondents, claiming violation of their rights and

fundamental freedoms. The petition was supported by the petitioners' affidavits sworn on the same day.

2. The facts giving rise to this litigation, were that on 13th July 2022 the 2nd respondent filed a case (ACEC No. E025 of 2022) at the Anti-Corruption Division of the High Court seeking orders to freeze the interested party's account(s) on allegations of unlawful acquisition of public funds. The petitioners were included in the suit as respondents. The case concerned a framework contract agreement dated 23rd March 2021 for supply of corn soya blend UNIMIX between the County government of Turkana and the interested party in which the interested party was paid a sum of Kshs 24,999,600.

3. The petitioners stated that by the time the interested party was awarded the contract by the

County Government of Turkana, they had already resigned as directors of the interested party (on 29th September 2019 and 12th April 2019 respectively). They further stated that the case before the Anti-Corruption Division was yet to be determined.

4. The petitioners asserted that the proceedings before the Anti-Corruption Division are subject of investigations by the 2nd respondent and they were being threatened with arrests. It is the petitioners' case that they had no interest whether directly or indirectly in the affairs of the interested party since resigning as directors in 2019. The threats of arrest are therefore malicious and an abuse of the justice system. The petitioners stated that continued threats of arrest and prosecution by the 2nd respondent's officers left them apprehensive of their

security, freedom of movement, well-being and right to liberty.

5. The petitioners maintained that articles 29 and 157(11) of the Constitution were violated or are threatened with violation and, therefore, sought the following reliefs:

a. A declaration be and is hereby issued that the respondents' investigations jointly and/or severally, singularly and cumulatively alleging criminal culpability of the petitioners arising out of the framework contract agreement and LPO dated 23rd March 2021 for supply of corn soya blend UNIMIX between the County government of Turkana and the interested party herein, after the resignation of the petitioners as directors of the interested party

are tainted with illegality, abuse of criminal justice process, malafides and are being and/or have been conducted with or for ulterior motive or extraneous purpose.

b. An order of prohibition directed to the respondents jointly and severally prohibiting any and all of them from arresting or detaining the petitioners or sanctioning their arrest or detention as a result of investigations arising out of the framework contract agreement and LPO dated 23rd March 2021 for supply of corn soya blend UNIMIX between the County government of Turkana and the interested party herein in, after resignation of the petitioners as directors of the interested party.

a) Any other relief that this Honourable Court may deem fit and just to grant in the interest of justice.

b) Costs of and incidental to this suit.

1st respondent's response

6. The 1st respondent informed the court that it filed grounds of opposition but they are not on the CTS.

2nd respondent's response

7. The 2nd respondent opposed the petition through a replying affidavit sworn on 28th May 2024. However, the document cannot be accessed on the CTS. The interested party did not file a response or submissions to the petition.

Submissions

8. The petition was disposed of through written submissions with brief oral highlights.

Petitioners' submissions

9. Mr. Bigambo, learned counsel for the petitioners adopted their pleadings and written submissions in urging the court to allow the petition. Learned counsel submitted that the power bestowed on the 1st respondent to charge and prosecute must be exercised for public good and it is subject to the supervision of this court to avoid abuse. According to counsel, by virtue of article 22 of the Constitution this court has jurisdiction to uphold Bill of Rights from threat of infringement.

10. Mr. Bigambo submitted that investigations should not start and proceed forever; that despite the 2nd respondent commencing investigations into the tender in question in 2021 and having taken their statements more than three times and sought

clarifications, investigations are yet to be concluded. Reliance was placed on the decision in *Hassan Ali Joho v Inspector General of Police & 3 others* [2017] eKLR for the position that investigations being carried out by the 2nd respondent are for ulterior motive; are unreasonable and are without probable cause in view of evidence in support of the petition.

11. Learned counsel posited that by virtue of article 47 of the Constitution, administrative action vested on and exercised by the respondents must be expeditious and efficient but this has not been the case. According to learned counsel, the petitioners' right to freedom guaranteed under article 29 of the Constitution is under threat on the basis of frivolous and sham investigations thus, the petitioners seek protection from the court. Counsel argued that the

respondents have not adduced evidence to demonstrate that they are beneficial owners of the interested party thus, no reasonable charges can be preferred against the petitioners.

1st respondent's submissions

12. Miss Ntabo, learned counsel for the 1st respondent relied on their grounds of opposition, and written submissions. Learned counsel submitted that this court has jurisdiction to hear and determine this petition. According to Miss Ntabo, the petition does not disclose any cause of action against the 1st respondent as the issues raised do not fall within its constitutional mandated stipulated under articles 157 of the Constitution.

13. Learned counsel relied on the decision in *William and others v Spautz* [1993] 2 LRC 659 (at 667) and *Leonard Otieno v Airtel Kenya Limited* [2018] eKLR for the position that the petitioners' right to equal protection and fair administrative process will be observed by the trial court. Learned counsel further submitted that the petitioners did not plead with precision the manner in which their fundamental rights and freedoms had been violated to warrant this court's intervention. Learned counsel relied on *Anarita Karimi Njeru v Republic* [1979] eKLR and *Mumo Matemo v Trusted Society of Human Rights Alliance & 5 others* [2014] eKLR.

14. Miss Ntabo again submitted that the petitioner's fundamental rights are not absolute thus, there must be a balance between their rights, rights of

others and public interest. The petitioner had further not indicated with clarity the rights that had been violated or are threatened.

2nd respondent's submissions

15. Mr. Kibugi, learned counsel for the 2nd respondent also relied on their replying affidavit and written submissions in opposing the petition. Learned counsel submitted that that the petitioners have a direct interest in the interested party notwithstanding their resignation as directors and transfer shares to other persons or back to the company. Learned counsel maintained that the petitioners retained the mandate to operate the interested party's bank account held at Equity Bank

and that the current directors and shareholders of the company are relatives of the petitioners.

16. Mr. Kibugi argued that changes in directorship and transfer of shares was a way of disguising beneficial ownership and create an avenue for the 2nd petitioner to trade with her employer contrary to section 42(3) of the Anti-Corruption and Economic Crimes Act. Investigations into the petitioners' criminal culpability is therefore not illegal or an abuse of the criminal justice system. Investigations were not being conducted for an ulterior motive.

17. Learned counsel relied on the decision in *Kenya National Examination Council v Republic Exparte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR to asserts that the 2nd respondent acted within its

mandate under section 11 (1) (d) &(j) of the Ethics and Anti-Corruption Commission Act.

18. Mr. Kibugi went on to argue that the exercise of its investigative mandate is not open to judicial review where the petitioners have not demonstrated any exceptional circumstances and this court should not therefore interfere with its mandate. Learned counsel relied on the decision in *Kipoki Oreu Tasur v Inspector General of Police, Officer in Charge of Central Police Station, Nairobi, Officer in Charge of Kilgoris Police Station, Director of Public Prosecution, Chief Magistrate Milimani Courts Nairobi & Principal Magistrate Kilgoris* [2014] KEHC 7964 (KLR).

19. Mr. Kibugi again cited the decision in *Anarita Karimi Njeru v Republic* (supra) for the position that

there is nexus between the petitioners and the interested party and therefore investigations on the petitioners is reasonable and necessary. Any future arrest would not be without just cause and the petitioners' rights guaranteed under article 29 of the Constitution are not threatened as alleged.

20. Mr. Kibugi maintained that exercise of its statutory mandate to investigate allegations of corruption and economic crime is in the public interest; that there are sufficient safeguards in the Constitution and the law to protect the petitioners' rights in the course of investigations, upon arrest and during trial.

Determination

21. I have considered the pleadings, arguments by parties and the decisions relied on. The issue for determination is whether the investigations and any possible arrest violate the petitioners' rights and fundamental freedoms and should therefore be stopped.

22. The petitioners' case is that they were directors of the interested party but resigned sometime in 2019 before the alleged crimes were committed and therefore not being officers of the interested party, investigations against them and any looming arrest and prosecution is a violation of their rights and fundamental freedoms guaranteed by the Constitution.

23. The 1st respondent denied doing anything that violates the petitioners' rights and fundamental freedoms. The 2nd respondents also denied violating the petitioners' rights and fundamental freedoms. According to the 2nd respondent, investigations revealed that there is nexus between the petitioners and the interested party and that investigations were being conducted in exercise of its statutory mandate.

24. The 2nd respondent was undertaking investigations pursuant to powers conferred on it by statute. That is; to investigating crimes alleged to have been committed in contravention of the law. The 2nd respondent has statutory mandate to discharge in the performance of its functions, namely; to investigate complaints made on commission of

crimes. This is a statutory obligation the law has placed on the 2nd respondent which it has to discharge.

25. In that regard, the 2nd respondent's officers are required to exercise their powers and discharge their functions subject to the constitutional safeguards of human rights and fundamental freedoms guaranteed by the Constitution. The 2nd respondent's officers can investigate any complaints of a criminal nature to ascertain whether or not a crime had been committed. Once investigations are concluded and the 2nd respondent forms the opinion that a crime had been committed, the investigation file is forwarded to the 1st respondent to make a decision on whether or not to charge and prosecute the person involved. If, however, investigations

conclude that no offence was committed, the file is closed and that is the end of the matter. The 2nd respondent would have discharged its statutory mandate.

26. On the other hand, where investigations conclude that an offence was committed, and the 1st respondent agrees that there is sufficient evidence to prosecute, article 157(6) of the Constitution confers on the 1st respondent constitutional mandate and discretion to initiate, continue and or terminate criminal prosecutions. When exercising this discretion, the 1st respondent does not require permission or consent from anybody or authority. Article 157(11), however, demands that when the 1st respondent is exercising his powers, he should do so in a manner that has regard to public interest,

interests of administration of justice and prevents and avoids abuse of the legal process. (See *Director of Public Prosecutions v Martin Mina & 4 others* [2017] eKLR).

27. In that regard, the law is settled that where investigations over a crime are being undertaken or the 1st respondent is exercising the constitutional mandate and discretion conferred on that office, courts should rarely interfere with the mandate of these offices. (See *Republic v Director of Public Prosecution & 2 others Ex parte Francis Njakwe Maina & another* [2015] eKLR and *Paul Ng'ang'a Nyaga v Attorney General & 3 others* (2013) eKLR).

28. It is clear from the constitutional text (article 157(10)) that the intention of the Constitution was to

enable the 1st respondent carry out his constitutional mandate without interference from anybody or authority. The Court cannot also direct the 1st respondent how to exercise his constitutional powers or interfere with exercise of that mandate unless there is clear evidence of violation of the Constitution, the law or a party's rights and fundamental freedoms. (*Francis Anyango Juma v The Director of Public Prosecutions and another* [2012] eKLR).

29. The 2nd respondent similarly has an obligation to investigate a complaint reported to it and once investigations are complete and the file passed on to the 1st respondent, the 1st respondent's decision whether to prefer charges and prosecute or not, is at his discretion. Courts will only come in where there

is evidence of abuse, malice or ulterior motive in exercising respective mandates of these institutions. That is, only where investigation and or institution of criminal prosecution exhibits abuse of discretion or undermines the essence of criminal justice system, will be interfered with by the court.

30. Article 22 of the Constitution grants every person the right to approach the court where there is a claim that a right and fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. When an application in that regard is instituted, article 23(3) of the Constitution confers on this Court jurisdiction to grant appropriate relief to redress denial, violation or infringement of, or threat to, a right or fundamental freedom. The essence of such relief is to ensure that the rights

enshrined in, and guaranteed by, the Constitution are protected and enforced. (*Fose v Minister of safety and Security* (CCT 14/1996) [1997] ZACC 6.

31. In this respect, for the court to act and enforce fundamental rights and freedoms, a petitioner has to satisfactorily demonstrate the violation of his rights and fundamental freedoms. If the court finds violation, it then invokes article 23(3) of the Constitution to grant appropriate relief. This is so, because as the Constitutional Court of Uganda stated in *Tinyefuze v Attorney General of Uganda* (Constitutional Petition No. 1 of 1996) [1997] UGCC 3, “if a petitioner succeeds in establishing breach of a fundamental right, he is entitled to the relief in exercise of constitutional jurisdiction as a matter of course.”

32. I have considered the petition and arguments by parties on this matter. The petitioners' grievance is that investigations against them and their possible arrest and prosecution threaten their rights and fundamental freedoms. They argued that they had resigned by the time the alleged offence was committed and therefore the investigation against them was being done with ulterior motive. The 2nd respondent on their part, argued that it acted in accordance with the Constitution and the law and that petitioners had not demonstrated violation of their rights and fundamental freedoms.

33. A claim for violation of rights and fundamental freedoms is first, a matter of fact, and once facts establish violation, it then becomes a question of law that a petitioner has to prove to the satisfaction of

the Court that indeed, his/her rights were violated or threatened in contravention of the Constitution and or the law.

34. In *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR the Supreme Court emphasised (at para 349) the importance of demonstrating a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement, which plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

35. The Supreme Court was simply saying that a party claiming violation of rights and fundamental freedoms should plead with precision, the

constitutional rights violated, the provisions infringed and demonstrate the manner of violation so that there is a link between the alleged violation, the rights infringed and the constitutional provisions violated in order to put the respondent on notice over the petitioner's claim so as to respond appropriately.

36. In this petition, the petitioners' complaint relates to investigations and possible arrest and prosecution. The 2nd respondent was exercising its mandate under the law and had an obligation to investigate any possible commission of a crime in discharge of that statutory mandate.

37. There was no evidence that the 1st respondent had made a decision to charge the petitioners. That means the 1st respondent had not done anything

that could be said to be violative of the Constitution, the law or rights and fundamental freedoms. Regarding investigations, the petitioners did not demonstrate that the manner in which investigations were being conducted was in violation of the Constitution, the law or rights and fundamental freedoms and point out the nature of the violations.

38. The petitioners' argument that they had resigned as officials of the interested party at the time the alleged crimes were committed, is a matter to be determined by the trial court should investigations lead to arrest and prosecution. This position was expressed by the Court of Appeal in *Director of Public Prosecutions v Martin Maina & 4 others* [2017] eKLR, that it is not the duty of the High Court in Judicial Review proceedings to evaluate the

sufficiency of evidence in the envisaged criminal proceedings, that is the function of the trial Court or the High Court in a criminal appeal. A Judicial Review Court should not usurp the functions of a trial court, except in the clearest of the cases.

39. There cannot be allegations of violation of rights and fundamental freedoms merely because the investigative agency and or the DPP are discharging their constitutional and statutory mandates. One has to do more and demonstrate that the exercise of respective mandate is being done in violation of the Constitution, the law or rights and fundamental freedoms. Short of that, there would be no basis for halting investigations as doing so would amount to interfering with the mandate of those institutions.

40. The position in law is clear that a party who claims that his/her rights and fundamental freedoms have been violated, must discharge the burden placed on him/her to show that there was violation and the manner of such violation. In this petition, it was not enough for the petitioners to argue that their rights were violated or threatened. Violation would be demonstrated if the petitioners showed that the respondents were acting contrary to constitutional provisions that protect rights and fundamental freedoms in the Bill of Rights or failed to act as required by the Constitution or the law. Without this demonstration, there cannot be a finding of violation of rights and fundamental freedoms.

41. The petitioners having failed to prove that the respondents violated any of the constitutional safeguards on rights and fundamental freedoms, the

conclusion the court comes to, is that the petition has no merit. It is declined and dismissed. Each party will bear their own costs.

**Dated and delivered this 30th Day of September
2025**

**E C MWITA
JUDGE**

ORIGINAL